Supreme Court, U.S.
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No. 91-1496

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

PETER C. REITER AND CALIFORNIA CONSOLIDATED ENTERPRISES, INC.,
Petitioners,

V.

LANGDON M. COOPER, TRUSTEE FOR CAROLINA MOTOR EXPRESS, INC., MARK & ASSOCIATES OF NORTH CAROLINA, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF AMERICAN FREIGHT SYSTEM, INC., AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

Norman E. Beal
Kurt Stohlgren
Hillix, Brewer, Hoffhaus,
Whittaker & Wright
2420 Pershing Road, Suite 400
Kansas City, MO 64108
Counsel for Amicus Curiae

Date: September 2, 1992

QUESTION PRESENTED

Amicus Curiae will address the following question:

Whether a claim of unreasonableness of a published and legally applicable tariff rate is a defense to an action at law to collect that tariff rate mandating stay of proceedings and referral of the issue to the Interstate Commerce Commission on the question of whether the filed rate is "reasonable" within the meaning of the Interstate Commerce Act.

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INTEREST OF THE AMICUS CURIAE

Amicus Curiae is American Freight System, Inc., 9393 W. 110th Street, Overland Park, Kansas 66210 (hereinafter referred to as "AFS"). AFS was a debtor-in-possession under Chapter 11 of the Bankruptcy Code in

Case No. 88-41050-11 commenced on August 16, 1988 before the United States Bankruptcy Court for the District of Kansas, Topeka Division. It is currently a debtor pursuant to a confirmed Plan of Reorganization dated June 10, 1991. Prior to its bankruptcy, AFS and its affiliates were common carriers by motor vehicle with annual revenues of approximately 500 million. Pursuant to the Plan, all assets and liabilities of AFS's Parent Company except specified cash and liabilities retained for its reorganization were transferred to AFS for liquidation. The reorganized Parent resumed its trucking business. AFS has to date distributed to its unsecured creditors sixty cents on each $1.00 of allowed claims and has scheduled an additional payment of twenty cents on the dollar to be made on or about September 11, 1992.

The issues presented by this case are of extreme importance to AFS. AFS has sued to recover of (1) original freight bill charges, (2) pre-petition charges representing portions of original freight bills not paid, (3) charges based upon freight bill corrections issued prior to bankruptcy and (4) freight bills corrected subsequent to its petition in bankruptcy. Actions pend for recovery of millions of dollars in both the pre-petition and the post-petition categories. Approximately $1 million of charges have been referred by the bankruptcy court and over $3 million more is subject to motions for reference over to the Interstate Commerce Commission (hereinafter referred to as the "ICC") for consideration of the reasonableness of the legal rates, with the orders of referral on appeal to the District Court. Though the bases

of charges and undercharges are myriad, neither the motions for reference over nor the orders issued by the bankruptcy court make any distinction as to why an issue of unreasonableness might attach to the type of shipments or type of charges within shipments in issue.

With no outside rate audit firm assistance, AFS conducted a post-bankruptcy audit of rates and charges on 16.8 million freight bills originally issued for $1.8 billion dollars from which approximately $26 million of undercharges were determined to be due: a 1.4% error rate.

Since bankruptcy, AFS has collected over $60 million of freight bills including undercharges. Most of the receivables collected (over $50 million), were original freight bill receivables, in the main collected immediately following bankruptcy. Had the remedy here sought by the major shipper interests been in effect, on the mere claim of unreasonableness, the entire collection stream could have been denied to AFS. Such an occurrence would have prevented the filing and implementation of AFS's Plan of Reorganization and the payment of unsecured creditors described above.

AFS never assumed there was any legal authority for it to agree to any rates and charges other than common carrier rates on file with the ICC or other rates legally published and legally effective. Prior to *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 110 S.Ct. 2759 (1990), AFS construed the Interstate Commerce Act and the decisions of this Court to prohibit the "Negotiated Rates Policy" enunciated by the ICC, which it viewed to

be not only a violation of the "filed rate doctrine," but also a violation of the crime provisions (illegal rebating) contained in Chapter 119 of Title 49 of the United States Code. AFS did not negotiate with parties and then fail to make publications following those negotiations.

Although AFS's corrected freight bill charges result from errors no different from those existing to prior to the Motor Carrier Act of 1980 (hereinafter referred to as "MC Act"), under which the ICC spawned the "Negotiated Rate Policy", the mere fact of bankruptcy sweeps all cases into the same swirl of rhetoric and delayed or avoided payment of legally applicable tariff charges with cases of negotiated rates with no tariff publication made. Some of the cost of delay is that since AFS's bankruptcy, 83 companies owing freight bill debts to AFS, of which 66 were defendants in lawsuits, have filed in bankruptcy and an additional 104 companies, of which 90 were defendants in lawsuits have closed or gone out of business, in total leaving over $500,000 of unpaid freight bill debts.

STATEMENT

AFS adopts the statement of the case presented in the opinion of the Court of Appeals (Petitioner's Appeal 2a-5a), but offers the following description of the business and regulatory circumstances of the case in the hope that it will assist the Court in its resolution of the issues.

The MC Act was a watershed change in the Interstate Commerce Act. Years of advocacy to Congress about the extent to which the MC Act should be amended

preceded enactment. The action taken by the Congress did not satisfy all advocates including, as of today, the majority of the Interstate Commerce Commission for the majority has presented to Congress its advocacy for reduction and/or total elimination of economic regulation of the trucking industry and Chairman Philbin has publicly announced his disdain for the "filed rate doctrine" and affinity for below cost pricing. See *Brief of Amicus Leonard L. Gumport* at 14 and Appendix A.

The sections of the Interstate Commerce Act providing the regulatory standards for just and reasonable, not unjustly discriminatory, and not wastefully destructive competitive rates, 49 U.S.C. §§ 10701, 10704, 10705, 10761 and supporting sections of Title 49, were left essentially unchanged by the MC Act of 1980. The MC Act of 1980 continued without change the charge to the Commission of the transportation policy, 49 U.S.C. § 10101:

> (1) In regulating those modes - (A) to recognize and preserve the inherent advantage of each mode of transportation; (B) to promote, safe, adequate, economical, and efficient transportation; (C) to encourage sound economic conditions in transportation, including sound economic conditions among carriers; (D) to encourage the establishment and maintenance of reasonable rates for transportation, without unreasonable discrimination or unfair or destructive

competitive practices; (E) to cooperate with each state and officials on each state on transportation matters; and (F) to encourage fair wages and working conditions in the transportation industry;

The change made by the MC Act occurred in paragraph 2 of the transportation policy which reads:

(2) regulating transportation by motor carrier, to promote competitive and efficient transportation services in order to (A) meet the needs of shippers, receivers, passengers, and consumers; (B) allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and traveling public; (C) allow the most productive use of equipment and energy resources; (D) enable efficient and well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions; (E) provide and maintain service to small communities and small shippers and intrastate bus services; (F) provide and maintain commuter bus operations; (G) improve and maintain a sound, safe, and competitive privately owned motor carrier system; (H) promote greater participation by minorities in the motor carrier system;

and (I) promote intermodal transportation; and

retaining the essential elements of the regulatory structure not changed by the MC Act by which it is possible to establish and maintain reasonable rates which are not unjustly discriminatory. The ICC was to foster the improvement of the motor carrier industry by application of the rigors of the existing principles stated in paragraph 1 of the Transportation Policy with a view toward accomplishing the goals added in paragraph 2.

Even though the basic standards of the Interstate Commerce Act were not changed, AFS experienced pressures until bankruptcy to establish rates for specific shippers far below the bare variable, out-of-pocket cost of performing the service. In order to survive when non-compensatory rates were required either short term or long term to maintain the totality of the system until the problem could be fixed (hopefully), other shippers were charged rates higher than they would otherwise pay to subsidize major shippers. Contrary to the assertions of the *Amici Curiae* in support of the *Petitioners, The National Industrial Transportation League, et al.* (hereinafter referred to as "the Major Shipper Interests"), brief, page 4 and fn.4, AFS discounts were not made to reduce the class rate levels on the basis that those rates were unreasonably high. Some shippers paid the class rates, others obtained small discounts and major shippers obtained, eventually as the decade progressed, huge discounts.

The ICC has watched a massive transfer of motor carrier assets to shippers powerful enough to extract huge discounts. Large shippers of freight have permitted to exert full market power without any limitation. That clout has been enhanced by shortened notice to effect publications of reductions in rates from 30 days' to 1 day's notice. This increase in the velocity of rate changes was not enacted by Congress in the MC Act; the ICC provided for the increased velocity on the urging by shipper interests. See *Short Notice Effectiveness for Independently Filed Motor Carrier and Freight Forwarded Rates*, 1 ICC 2d 146 (1984). In this case, the advocates and beneficiaries of such policy seek relief from a situation of their own making.

If the shipping community were now advised it need not pay the legally applicable freight charges until such were reviewed by the ICC, it is impossible to estimate the amount of further losses that would be experienced by the motor carrier industry. Such a holding would emasculate the time of payment requirements of the ICC credit regulations. 49 C.F.R. Part 1320. The relief requested by the major shipping interests would destroy the statutory requirement that the legal charges be timely collected.

SUMMARY OF ARGUMENT

The Petitioners and supporting *Amici* attempt to carve out a bankruptcy exception to the filed rate doctrine. Such an exception is contrary to statute and this Court's

precedent. This Court's precedent has strictly held that under the Interstate Commerce Act the shipper was bound to pay the filed rate. *Arizona Grocery Co. v. Atchison, T. & S. F. R., Co.*, 284 U.S. 370, 384-385 (1932). The filed rate doctrine was most recently upheld in this Court's decision in *Maislin*.

The shipper's only remedy for imposition of unreasonable motor carrier rates in the past is contained in 49 U.S.C. § 11705(b)(3) which provides for damages resulting from the imposition of rates for transportation that the ICC finds unreasonable. Petitioners and *Amici* seek to avoid the requirements of 11705 by asserting that whenever a rate reasonableness defense is raised against a bankrupt carrier the court must refer the issue to the ICC under the doctrine of primary jurisidction for a determination of rate reasonableness. Not only is the mere phrasing of an issue as a matter of rate reasonableness insufficient to invoke the primary jurisdiction of the ICC, see *United States v. Western Pacific R. Co.*, 352 U.S. 59 (1956), the procedure sought by the Petitioners and supporting *Amici* is equivalent to the procedure declared unauthorized and invalid by the Court in *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959).

Petitioners and *Amici* assert that prejudice to shippers awarded reparations will result from an inability to obtain payment of reparations because of the carrier's bankruptcy. The legal rights of the shipper are not prejudiced, however. Upon payment of the legal rates and any subsequent award of reparations, the shipper will become entitled to a pro rata share of the assets available

to pay unsecured creditors of the bankruptcy estate. The shipper is in no worse position than the other general unsecured creditors of the bankruptcy estate.

A bankruptcy or insolvency exception to the filed rate doctrine creates the very discrimination prohibited by the Interstate Commerce Act. Shippers who may defer payment to bankrupt or insolvent carriers pending referral to the ICC on the issue of rate reasonableness will gain a preference over shippers who must pay the legal rates.

ARGUMENT

I. Construction of a Bankruptcy or Insolvency Exception to the Filed Rate Doctrine is Unlawful.

The Petitioners, the Major Shipper Interests, and *Amici Curiae* United States and the Interstate Commerce Commission (hereinafter referred to collectively as the "ICC") in their respective briefs attempt to carve out a bankruptcy or insolvency exception to the filed rate doctrine. The posture of the Petitioners is reflected in their summary of argument at page 7 of their brief as follows:

> If they must pay the disputed amounts first, their "right" is meaningless as they will never get their money back owing to Carolina's bankruptcy. Respondents are bankrupt. If Petitioners win before the ICC, their

> standing is that of mere unsecured creditors.

The posture of the Major Shipper Interests illustrated at page 18 of their brief is stated:

> Nor must the Court decide here whether courts should stay all undercharge actions and refer the question of reasonableness to the ICC, or whether they should require shippers to pay the filed rates and then seek recovery of the difference in separate, sequential actions before the ICC when that procedure will not clearly prejudice either of the parties.

The ICC at page 10-11 of its brief states:

> To interpret the filed rate doctrine to erect a per se barrier to referral would defeat the goals of the Act when the carrier is enmeshed in bankruptcy proceedings. The defunct carrier suffers no prejudice from a stay of the collection action and referral to the ICC. On the other hand, without a prior referral, the shipper would lack an adequate remedy for a claim of unreasonableness, because a subsequent reparations proceeding against a bankrupt carrier offers no realistic promise of relief.

Petitioners' request for relief from immediate payment of the freight charges of Respondent (hereinafter referred to as "the Carrier") pending referral to the ICC is falsely premised on the notion that they will be prejudiced by an inability to obtain payment of any reparations awarded because of the Carrier's bankruptcy.

If the Petitioners comply with their legal duty to pay the legal rate but subsequently obtain a judgment of reparations, creating general unsecured claims against the Carrier's estate, they will become entitled to a pro rata share of the assets available to pay the unsecured creditors. This is in complete accord with the principle of equality of distribution fundamental to bankruptcy administration. See *Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215, 219 (1941). They cannot therefore claim their legal rights have been prejudiced as against either the Carrier's bankruptcy estate or its general unsecured creditors.

Prior to shipment, the shipper's remedy for rate unreasonableness is a determination by the ICC pursuant to 49 U.S.C. § 11701, that the effective legal rate is unreasonable and a prescription of a reasonable rate for the future. 49 U.S.C. § 11701(a) states, in part:

> The Interstate Commerce Commission may begin an investigation under this subtitle on its own initiative or on complaint. If the Commission finds that a carrier, broker, or freight forwarder is violating this subtitle, the Commission shall take appropriate

> action to compel compliance with this subtitle.

After payment of the legal rate, the shipper has another, but mutually exclusive, remedy for unreasonable rates in the past.

After shipment, the shipper's only remedy for the imposition of unreasonable freight rates in the past is contained in 49 U.S.C. § 11705(b)(3), which provides:

> The common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II or IV of Chapter 105 of this title or a freight forwarder is liable for damages resulting from the imposition of rates for transportation or service the Commission finds to be in violation of this subtitle.

The reasonableness requirement for rates is at 49 U.S.C. § 10701(a) which provides, in part:

> A rate (other than a rail rate), classification, rule, or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under Chapter 105 of this title must be reasonable.

In actions for "reparations", shippers individually seek, as of right, damages measured by the exact difference between the charges paid and the just and reasonable rates. *United States v. Associated Transport, Inc.*, 505 F.2d 366, 369 (D.C. Cir. 1974). Thus, an unlawfully charged shipper may recover to the extent the ICC finds the charges to have been unreasonable. After actual shipment but before payment of the legal transportation charges there is no remedy available for unreasonable rates. Rather, there is an absolute duty on the part of the shipper to pay the legal rate.

The procedure sought by the Petitioners and supporting *Amici* would permit non-payment of the legal rate pending a determination by the ICC of rate reasonableness. In other words, unreasonableness of rates would constitute an affirmative defense. This is equivalent to the procedure set up by the ICC prior to 1959 whereby shippers such as Petitioner could petition the ICC for an order waiving undercharges. See *Bell Potato Chip Co. v. Aberdeen Truckline*, 43 MCC 337 (1944). This procedure was challenged in *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959) and it was declared unauthorized and invalid.

In *T.I.M.E.*, several motor common carriers sued the United States to collect freight charges. The government defended on the grounds that the rates upon which the carriers relied were unjust and unreasonable. The Court held that the Interstate Commerce Act did not "give shippers a statutory cause of action for the recovery of allegedly unreasonable past rates or to enable them to

assert 'unreasonable' as a defense in carrier suits to recover applicable tariff rates." 359 U.S. at 470.

A portion of the analysis of the Court in *T.I.M.E.* is pertinent to the analysis of the change in the law since that time. The Court described the status of the law in 1959 as follows:

> The very provisions of Part I and their counterparts in Part III, which give a right of action to shippers against carriers for damages incurred by carrier violations of the Act and provide the mechanics for the enforcement of that right are conspicuously absent in the Motor Carrier Act. Thus, where § 8 of Part I (fn.7) provides that any common carrier subject to the provisions of this chapter [who] shall do ... any act ... in this chapter ... declared to be unlawful ... shall be liable to the person or persons injured thereby for the full amount of the damages sustained ... Part II has no comparable provision. Again whereas § 9 of Part I (fn.8) gives an injured shipper the right to sue in the ICC or in the Federal District Court, Part II contains no comparable provision. In addition, §§ 13(1) and 16 of Part 1 (fn.9) give a shipper claiming reparation the right to proceed in the Commission and to enforce his

> reparation award in the courts, and Part II contains no comparable provisions.

359 U.S. at 470-471 (footnotes omitted). The Court explained that previous attempts to get Congress to establish the Part I provisions upon implementing the right of reparations against rail carriers in Part II as to motor carriers were not adopted. *Id.* at 471. The Court held that no common law right to seek damages in the courts survived the enactment of the Motor Carrier Act. *Id.* at 472.

Then, as now, the general requirement of 49 U.S.C. § 10701(a) imposed upon common carriers a duty to maintain reasonable rates, but provides no remedy for past violations of that duty and hence, it provides shippers no defense for a violation of that duty. Following the *T.I.M.E.* decision invalidating the ICC reparations procedure Congress enacted the reparation provision now contained in 49 U.S.C. § 11705(b)(3), authorizing reparations actions to recover damages caused by payment of unreasonable rates in the past. Pub. L. 89-170, 79 Stat. 651 (1965). A remedy for past violations was established.

In *T.I.M.E.*, the Court rejected the argument of the government that the MC Act preserved a pre-existing common law right to a reasonable rate, a determination of which the government argued was a matter referable to the ICC. Citing *Montana - Dakota Utilities v. Northwestern Public Service Co.*, 341 U.S. 246, 255 (1951), the Court rejected the government's rate reasonableness defense as involving issues which courts have no authority to

adjudicate and can only refer to a body which also would have no independent jurisdiction to decide. 459 at 474.

Petitioners and supporting *Amici* are asking this Court to hold that a district court in a civil action, other than a shipper action for reparations, may refer to the ICC the issue of rate reasonableness for a preliminary determination whenever the issue is raised as a defense to payment of a motor carrier rate, even though district courts have no authority to adjudicate the reasonableness of a motor carrier's rates absent a shipper action for reparations. Petitioners and supporting *Amici* urge the Court to make such a holding, not pursuant to the statute under which the ICC has jurisdiction to decide damages resulting from payment of the legal rate, but rather under the statute which gives the ICC no jurisdiction to decide damages. The Petitioners and supporting *Amici* urge this Court to give the ICC authority to nullify legal rates legally owing, but not paid. This is the same remedy denied by the Court in *T.I.M.E.*

The Major Shipper Interests argue further that the legal rates may be avoided in the bankruptcy context by asserting setoff. The Petitioner's in this case cannot successfully assert, however, a right of setoff on the basis of an allegedly unreasonable rate. 11 U.S.C. § 553 provides in part:

> Except as otherwise provided in this section and in §§ 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor

> to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case, ...

(Emphasis supplied).

The Petitioners have no right of setoff subject to 11 U.S.C. § 553 because the Carrier does not owe a debt to the Petitioners. Under the Bankruptcy Code, "debt" is defined as "liability on a claim". 11 U.S.C. § 101(12). "Claim" is defined under the Bankruptcy Code as a --

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

11 U.S.C. § 101(5). In this case, Petitioners have asserted no right to payment. Nor are Petitioners capable of

asserting such right when they have failed to comply with their statutory duty to pay the legal freight charges. Without payment of the legal rate, neither a claim for damages or restoration of amounts paid, as required by the reparations statute, is possible. The Major Shipper Interests confuse a "claim" with a "defense". The latter is what Petitioners really assert.

The Petitioners and supporting *Amici* argue that a bankruptcy or insolvency exception should exist to the filed rate doctrine because their reparations remedy, if any, might be meaningless. A bankruptcy or insolvency exception to the filed rate doctrine, however, creates the very discrimination prohibited by the Interstate Commerce Act. Shippers who owe legal freight bill debts to solvent non-bankrupt carriers will still be required to pay the legal rates. The shippers owing legal debts to bankrupt or insolvent motor carriers will gain an advantage over shippers who must pay the legal rates by their right to defer payment of the legal rates on the bare assertion of unreasonableness. Such preferential treatment provides the non-paying shippers a windfall.

The remedy sought here has no counterbalance under the current Interstate Commerce Act. A shipper that has obtained a legal but unreasonably low rate has taken carrier assets to the extent that charges assessed and collected fall short of the cost of performing the service without any remedy available to the carrier. The only counterbalance would be a rule allowing either the bankrupt carrier or shipper to seek damages based upon a determination of the "reasonable" rate.

Not only is there no bankruptcy or insolvency exception to the filed rate doctrine under the Interstate Commerce Act, not all bankruptcy cases are alike. As an example, the disclosure statement filed and approved in AFS's bankruptcy case estimates a maximum possible dividend estimated to be in excess of $1.00. With the distribution scheduled on or about September 11, 1992, AFS will have paid eighty cents on the dollar to unsecured creditors. If shippers seeking referral to the ICC in AFS's turnover actions had paid the legal rates when billed and filed suits for reparations, assuming arguendo rate reasonableness is a legitimate issue in any of the cases, and prevailed, these shippers would be unsecured creditors capable of realizing a substantial dividend, up to 130% pursuant to the Plan, on their claims.

II. The Petitioners and Supporting Amici Misinterpret this Court's Prior Holdings in Asserting that a Finding by the ICC that the Filed Rate is Reasonable, if disputed, is a Prerequisite to its Enforceability.

The proposition advocated by Petitioners and supporting *Amici* that a finding by the Interstate Commerce Commission that a filed rate is reasonable, if disputed, is a prerequisite to its enforceability is contrary to the filed rate doctrine. In support of this proposition, Petitioner and the Major Shipper Interests continue to rely primarily on an excerpt from this Court's decision in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 110 S.Ct.

2759, 2768 at n.10 (1990) to wit, "the filed rate doctrine, however, contains an important caveat: the filed rate is not enforceable if the ICC finds the rate to be unreasonable," and their interpretation of the Court's decision in *United States v. Western Pacific R. Co.*, 352 U.S. 59 (1956).

A. Maislin

The reliance on the quotation from *Maislin* is misplaced. This Court's warning is plainly substantive and not procedural. If upon a properly brought reparations action a rate is found unreasonable, it is not thereafter enforceable. The statement by this Court does not say that procedurally a rate is not enforceable until, upon a claim of unreasonableness, the ICC determines that the legal rate is reasonable. Had this Court meant as the Petitioners assert the *Maislin* decision would be internally inconsistent. Simply stated, it is impossible to have the legal filed rates subject to mandatory collection as stated by this Court in *Maislin*, citing as here pertinent the statement in *Arizona Grocery v. Atchison, Topeka, & Santa Fe R. Co.*, 204 U.S. 370 (1980); to wit, "under [the Act] the shipper was bound to pay the legal rate; but if he could show that it was unreasonable he might recover reparation, and at the same time hold that the legal rate is not collectable unless and until the ICC upon formal complaint asserting unreasonableness determines it to be reasonable. The net result in the *Maislin* decision would be that the filed rate is not collectable even though this Court has at length advised in the decision that the legally

filed rate is the only rate that may be charged and must be collected. This Court's holding in this regard in *Maislin* at page 2768, *supra.*, is as follows:

> We disagree. For a century, this court has held that the Act, as it incorporates the filed rate doctrine, forbids as discriminatory the secret negotiation and collection of rates lower than the filed rate. See *supra.* at _____. By refusing to order collection of the filed rate solely because the parties have agreed to a lower rate, the ICC has permitted the very price discrimination the Act by its terms seeks to prevent. See 49 U.S.C. § 10741. [Also citing *Armour Packing Co. v. United States*, 209 U.S. 56, 81 (1908)].

B. Western Pacific

Reliance on the decision in *United States v. Western Pacific R. Co.*, 352 U.S. 59 (1956), by Petitioners and the supporting *Amici* is also misplaced. In *Western Pacific*, three railroads sought to collect additional freight charges from the United States for the transportation of aerial bomb casings containing napalm gel. The railroads contended that a tariff covering the shipment of incendiary bombs applied. The United States asserted that a tariff covering the transportation of gasoline in steel drums was applicable. The United States further asserted that, if the tariff for incendiary bombs was applicable, the tariff would

be unreasonable as applied to these shipments and, only as to this issue, the United States asserted that the matter should be referred to the ICC. The Court of Claims found for the railroads.

Neither of the parties questioned the lower court's decision construing the tariffs in finding that the tariff covering incendiary bombs applied to these particular shipments. The Court, however, on its own initiative, reviewed the lower court's decision concerning the applicable tariff and found, on the basis of the factual record, that extrinsic evidence and special expertise were required. Accordingly, this Court directed that the issue be submitted to the ICC. The decision is devoted almost entirely to an analysis of the factual record as to proper classification.

With respect to the rate reasonableness issue, the Court found that it was in substance simply a part of the applicability issue. The United States did not assert that the tariff rate on incendiary bombs was unreasonable, only that the rate as applied to these particular shipments was too high because various expenses which were incurred in shipping incendiary devices generally were not incurred in this particular instance. The Court analyzed the reasonableness issue as follows:

> This seems to us to be but another way of saying that the wrong tariff was applied. In both instances the issue is whether the factors which call for a high rate on incendiary bomb shipments are present in a

> shipment of bomb casings full of napalm gel but lacking bursters and fuses... . By no means do we imply that matters of tariff construction are never cognizable in the courts... . We say merely that where, as here, the problem of cost-allocation is relevant, and where therefore the question of construction and reasonableness are so intertwined that the same factors are determinative on both issues, that it is the Commission which must first pass on them.

Id. at 68-69. The Court did not hold that rate reasonableness could be asserted independently as a defense to payment of the filed rate. Nor does *Western Pacific* mandate referral upon the mere assertion that a shipper considers a tariff rate to be unreasonable. On the contrary, the Court in *Western Pacific* stated that:

> And the mere fact that the issue is phrased in on instance as a matter of tariff construction and in the other as a matter of reasonableness should not be determinative on the jurisdictional issue. To hold otherwise would make the doctrine of primary jurisdiction an abstraction to be called into question at the whim of the pleader. *Id.* at 68-69 (footnote omitted).

In this case, and in the cases brought by AFS, a "reasonableness" issue has been asserted at the whim of the shippers, and as a tactic to avoid or delay paying the freight charges legally due. The tactic should be condemned.

CONCLUSION

In view of the above arguments and authorities, *Amicus Curiae* respectfully requests the decision of the Court of Appeals be affirmed.

Respectfully submitted,

By: Norman E. Beal

Norman E. Beal
Kurt Stohlgren
HILLIX, BREWER, HOFFHAUS,
WHITTAKER & WRIGHT
2420 Pershing Road
Two Crown Center
Kansas City, Missouri 64108
(816) 221-0355

ATTORNEYS FOR AMICUS CURIAE

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be not only a violation of the "filed rate doctrine," but also a violation of the crime provisions (illegal rebating) contained in Chapter 119 of Title 49 of the United States Code. AFS did not negotiate with parties and then fail to make publications following those negotiations.

Although AFS's corrected freight bill charges result from errors no different from those existing to prior to the Motor Carrier Act of 1980 (hereinafter referred to as "MC Act"), under which the ICC spawned the "Negotiated Rate Policy", the mere fact of bankruptcy sweeps all cases into the same swirl of rhetoric and delayed or avoided payment of legally applicable tariff charges with cases of negotiated rates with no tariff publication made. Some of the cost of delay is that since AFS's bankruptcy, 83 companies owing freight bill debts to AFS, of which 66 were defendants in lawsuits, have filed in bankruptcy and an additional 104 companies, of which 90 were defendants in lawsuits have closed or gone out of business, in total leaving over $500,000 of unpaid freight bill debts.

STATEMENT

AFS adopts the statement of the case presented in the opinion of the Court of Appeals (Petitioner's Appeal 2a-5a), but offers the following description of the business and regulatory circumstances of the case in the hope that it will assist the Court in its resolution of the issues.

The MC Act was a watershed change in the Interstate Commerce Act. Years of advocacy to Congress about the extent to which the MC Act should be amended

preceded enactment. The action taken by the Congress did not satisfy all advocates including, as of today, the majority of the Interstate Commerce Commission for the majority has presented to Congress its advocacy for reduction and/or total elimination of economic regulation of the trucking industry and Chairman Philbin has publicly announced his disdain for the "filed rate doctrine" and affinity for below cost pricing. See *Brief of Amicus Leonard L. Gumport* at 14 and Appendix A.

The sections of the Interstate Commerce Act providing the regulatory standards for just and reasonable, not unjustly discriminatory, and not wastefully destructive competitive rates, 49 U.S.C. §§ 10701, 10704, 10705, 10761 and supporting sections of Title 49, were left essentially unchanged by the MC Act of 1980. The MC Act of 1980 continued without change the charge to the Commission of the transportation policy, 49 U.S.C. § 10101:

> (1) In regulating those modes - (A) to recognize and preserve the inherent advantage of each mode of transportation; (B) to promote, safe, adequate, economical, and efficient transportation; (C) to encourage sound economic conditions in transportation, including sound economic conditions among carriers; (D) to encourage the establishment and maintenance of reasonable rates for transportation, without unreasonable discrimination or unfair or destructive

> competitive practices; (E) to cooperate with each state and officials on each state on transportation matters; and (F) to encourage fair wages and working conditions in the transportation industry;

The change made by the MC Act occurred in paragraph 2 of the transportation policy which reads:

> (2) regulating transportation by motor carrier, to promote competitive and efficient transportation services in order to (A) meet the needs of shippers, receivers, passengers, and consumers; (B) allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and traveling public; (C) allow the most productive use of equipment and energy resources; (D) enable efficient and well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions; (E) provide and maintain service to small communities and small shippers and intrastate bus services; (F) provide and maintain commuter bus operations; (G) improve and maintain a sound, safe, and competitive privately owned motor carrier system; (H) promote greater participation by minorities in the motor carrier system;

> and (I) promote intermodal transportation; and

retaining the essential elements of the regulatory structure not changed by the MC Act by which it is possible to establish and maintain reasonable rates which are not unjustly discriminatory. The ICC was to foster the improvement of the motor carrier industry by application of the rigors of the existing principles stated in paragraph 1 of the Transportation Policy with a view toward accomplishing the goals added in paragraph 2.

Even though the basic standards of the Interstate Commerce Act were not changed, AFS experienced pressures until bankruptcy to establish rates for specific shippers far below the bare variable, out-of-pocket cost of performing the service. In order to survive when non-compensatory rates were required either short term or long term to maintain the totality of the system until the problem could be fixed (hopefully), other shippers were charged rates higher than they would otherwise pay to subsidize major shippers. Contrary to the assertions of the *Amici Curiae* in support of the *Petitioners, The National Industrial Transportation League, et al.* (hereinafter referred to as "the Major Shipper Interests"), brief, page 4 and fn.4, AFS discounts were not made to reduce the class rate levels on the basis that those rates were unreasonably high. Some shippers paid the class rates, others obtained small discounts and major shippers obtained, eventually as the decade progressed, huge discounts.

The ICC has watched a massive transfer of motor carrier assets to shippers powerful enough to extract huge discounts. Large shippers of freight have permitted to exert full market power without any limitation. That clout has been enhanced by shortened notice to effect publications of reductions in rates from 30 days' to 1 day's notice. This increase in the velocity of rate changes was not enacted by Congress in the MC Act; the ICC provided for the increased velocity on the urging by shipper interests. See *Short Notice Effectiveness for Independently Filed Motor Carrier and Freight Forwarded Rates*, 1 ICC 2d 146 (1984). In this case, the advocates and beneficiaries of such policy seek relief from a situation of their own making.

If the shipping community were now advised it need not pay the legally applicable freight charges until such were reviewed by the ICC, it is impossible to estimate the amount of further losses that would be experienced by the motor carrier industry. Such a holding would emasculate the time of payment requirements of the ICC credit regulations. 49 C.F.R. Part 1320. The relief requested by the major shipping interests would destroy the statutory requirement that the legal charges be timely collected.

SUMMARY OF ARGUMENT

The Petitioners and supporting *Amici* attempt to carve out a bankruptcy exception to the filed rate doctrine. Such an exception is contrary to statute and this Court's

precedent. This Court's precedent has strictly held that under the Interstate Commerce Act the shipper was bound to pay the filed rate. *Arizona Grocery Co. v. Atchison, T. & S. F. R., Co.*, 284 U.S. 370, 384-385 (1932). The filed rate doctrine was most recently upheld in this Court's decision in *Maislin*.

The shipper's only remedy for imposition of unreasonable motor carrier rates in the past is contained in 49 U.S.C. § 11705(b)(3) which provides for damages resulting from the imposition of rates for transportation that the ICC finds unreasonable. Petitioners and *Amici* seek to avoid the requirements of 11705 by asserting that whenever a rate reasonableness defense is raised against a bankrupt carrier the court must refer the issue to the ICC under the doctrine of primary jurisidction for a determination of rate reasonableness. Not only is the mere phrasing of an issue as a matter of rate reasonableness insufficient to invoke the primary jurisdiction of the ICC, see *United States v. Western Pacific R. Co.*, 352 U.S. 59 (1956), the procedure sought by the Petitioners and supporting *Amici* is equivalent to the procedure declared unauthorized and invalid by the Court in *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959).

Petitioners and *Amici* assert that prejudice to shippers awarded reparations will result from an inability to obtain payment of reparations because of the carrier's bankruptcy. The legal rights of the shipper are not prejudiced, however. Upon payment of the legal rates and any subsequent award of reparations, the shipper will become entitled to a pro rata share of the assets available

to pay unsecured creditors of the bankruptcy estate. The shipper is in no worse position than the other general unsecured creditors of the bankruptcy estate.

A bankruptcy or insolvency exception to the filed rate doctrine creates the very discrimination prohibited by the Interstate Commerce Act. Shippers who may defer payment to bankrupt or insolvent carriers pending referral to the ICC on the issue of rate reasonableness will gain a preference over shippers who must pay the legal rates.

ARGUMENT

I. Construction of a Bankruptcy or Insolvency Exception to the Filed Rate Doctrine is Unlawful.

The Petitioners, the Major Shipper Interests, and *Amici Curiae* United States and the Interstate Commerce Commission (hereinafter referred to collectively as the "ICC") in their respective briefs attempt to carve out a bankruptcy or insolvency exception to the filed rate doctrine. The posture of the Petitioners is reflected in their summary of argument at page 7 of their brief as follows:

> If they must pay the disputed amounts first, their "right" is meaningless as they will never get their money back owing to Carolina's bankruptcy. Respondents are bankrupt. If Petitioners win before the ICC, their

> standing is that of mere unsecured creditors.

The posture of the Major Shipper Interests illustrated at page 18 of their brief is stated:

> Nor must the Court decide here whether courts should stay all undercharge actions and refer the question of reasonableness to the ICC, or whether they should require shippers to pay the filed rates and then seek recovery of the difference in separate, sequential actions before the ICC when that procedure will not clearly prejudice either of the parties.

The ICC at page 10-11 of its brief states:

> To interpret the filed rate doctrine to erect a per se barrier to referral would defeat the goals of the Act when the carrier is enmeshed in bankruptcy proceedings. The defunct carrier suffers no prejudice from a stay of the collection action and referral to the ICC. On the other hand, without a prior referral, the shipper would lack an adequate remedy for a claim of unreasonableness, because a subsequent reparations proceeding against a bankrupt carrier offers no realistic promise of relief.

Petitioners' request for relief from immediate payment of the freight charges of Respondent (hereinafter referred to as "the Carrier") pending referral to the ICC is falsely premised on the notion that they will be prejudiced by an inability to obtain payment of any reparations awarded because of the Carrier's bankruptcy.

If the Petitioners comply with their legal duty to pay the legal rate but subsequently obtain a judgment of reparations, creating general unsecured claims against the Carrier's estate, they will become entitled to a pro rata share of the assets available to pay the unsecured creditors. This is in complete accord with the principle of equality of distribution fundamental to bankruptcy administration. See *Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215, 219 (1941). They cannot therefore claim their legal rights have been prejudiced as against either the Carrier's bankruptcy estate or its general unsecured creditors.

Prior to shipment, the shipper's remedy for rate unreasonableness is a determination by the ICC pursuant to 49 U.S.C. § 11701, that the effective legal rate is unreasonable and a prescription of a reasonable rate for the future. 49 U.S.C. § 11701(a) states, in part:

> The Interstate Commerce Commission may begin an investigation under this subtitle on its own initiative or on complaint. If the Commission finds that a carrier, broker, or freight forwarder is violating this subtitle, the Commission shall take appropriate

> action to compel compliance with this subtitle.

After payment of the legal rate, the shipper has another, but mutually exclusive, remedy for unreasonable rates in the past.

After shipment, the shipper's only remedy for the imposition of unreasonable freight rates in the past is contained in 49 U.S.C. § 11705(b)(3), which provides:

> The common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II or IV of Chapter 105 of this title or a freight forwarder is liable for damages resulting from the imposition of rates for transportation or service the Commission finds to be in violation of this subtitle.

The reasonableness requirement for rates is at 49 U.S.C. § 10701(a) which provides, in part:

> A rate (other than a rail rate), classification, rule, or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under Chapter 105 of this title must be reasonable.

In actions for "reparations", shippers individually seek, as of right, damages measured by the exact difference between the charges paid and the just and reasonable rates. *United States v. Associated Transport, Inc.*, 505 F.2d 366, 369 (D.C. Cir. 1974). Thus, an unlawfully charged shipper may recover to the extent the ICC finds the charges to have been unreasonable. After actual shipment but before payment of the legal transportation charges there is no remedy available for unreasonable rates. Rather, there is an absolute duty on the part of the shipper to pay the legal rate.

The procedure sought by the Petitioners and supporting *Amici* would permit non-payment of the legal rate pending a determination by the ICC of rate reasonableness. In other words, unreasonableness of rates would constitute an affirmative defense. This is equivalent to the procedure set up by the ICC prior to 1959 whereby shippers such as Petitioner could petition the ICC for an order waiving undercharges. See *Bell Potato Chip Co. v. Aberdeen Truckline*, 43 MCC 337 (1944). This procedure was challenged in *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959) and it was declared unauthorized and invalid.

In *T.I.M.E.*, several motor common carriers sued the United States to collect freight charges. The government defended on the grounds that the rates upon which the carriers relied were unjust and unreasonable. The Court held that the Interstate Commerce Act did not "give shippers a statutory cause of action for the recovery of allegedly unreasonable past rates or to enable them to

assert 'unreasonable' as a defense in carrier suits to recover applicable tariff rates." 359 U.S. at 470.

A portion of the analysis of the Court in *T.I.M.E.* is pertinent to the analysis of the change in the law since that time. The Court described the status of the law in 1959 as follows:

> The very provisions of Part I and their counterparts in Part III, which give a right of action to shippers against carriers for damages incurred by carrier violations of the Act and provide the mechanics for the enforcement of that right are conspicuously absent in the Motor Carrier Act. Thus, where § 8 of Part I (fn.7) provides that any common carrier subject to the provisions of this chapter [who] shall do ... any act ... in this chapter ... declared to be unlawful ... shall be liable to the person or persons injured thereby for the full amount of the damages sustained ... Part II has no comparable provision. Again whereas § 9 of Part I (fn.8) gives an injured shipper the right to sue in the ICC or in the Federal District Court, Part II contains no comparable provision. In addition, §§ 13(1) and 16 of Part 1 (fn.9) give a shipper claiming reparation the right to proceed in the Commission and to enforce his

> reparation award in the courts, and Part II contains no comparable provisions.

359 U.S. at 470-471 (footnotes omitted). The Court explained that previous attempts to get Congress to establish the Part I provisions upon implementing the right of reparations against rail carriers in Part II as to motor carriers were not adopted. *Id.* at 471. The Court held that no common law right to seek damages in the courts survived the enactment of the Motor Carrier Act. *Id.* at 472.

Then, as now, the general requirement of 49 U.S.C. § 10701(a) imposed upon common carriers a duty to maintain reasonable rates, but provides no remedy for past violations of that duty and hence, it provides shippers no defense for a violation of that duty. Following the *T.I.M.E.* decision invalidating the ICC reparations procedure Congress enacted the reparation provision now contained in 49 U.S.C. § 11705(b)(3), authorizing reparations actions to recover damages caused by payment of unreasonable rates in the past. Pub. L. 89-170, 79 Stat. 651 (1965). A remedy for past violations was established.

In *T.I.M.E.*, the Court rejected the argument of the government that the MC Act preserved a pre-existing common law right to a reasonable rate, a determination of which the government argued was a matter referable to the ICC. Citing *Montana - Dakota Utilities v. Northwestern Public Service Co.*, 341 U.S. 246, 255 (1951), the Court rejected the government's rate reasonableness defense as involving issues which courts have no authority to

adjudicate and can only refer to a body which also would have no independent jurisdiction to decide. 459 at 474.

Petitioners and supporting *Amici* are asking this Court to hold that a district court in a civil action, other than a shipper action for reparations, may refer to the ICC the issue of rate reasonableness for a preliminary determination whenever the issue is raised as a defense to payment of a motor carrier rate, even though district courts have no authority to adjudicate the reasonableness of a motor carrier's rates absent a shipper action for reparations. Petitioners and supporting *Amici* urge the Court to make such a holding, not pursuant to the statute under which the ICC has jurisdiction to decide damages resulting from payment of the legal rate, but rather under the statute which gives the ICC no jurisdiction to decide damages. The Petitioners and supporting *Amici* urge this Court to give the ICC authority to nullify legal rates legally owing, but not paid. This is the same remedy denied by the Court in *T.I.M.E.*

The Major Shipper Interests argue further that the legal rates may be avoided in the bankruptcy context by asserting setoff. The Petitioner's in this case cannot successfully assert, however, a right of setoff on the basis of an allegedly unreasonable rate. 11 U.S.C. § 553 provides in part:

> Except as otherwise provided in this section and in §§ 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor

> to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case, ...

(Emphasis supplied).

The Petitioners have no right of setoff subject to 11 U.S.C. § 553 because the Carrier does not owe a debt to the Petitioners. Under the Bankruptcy Code, "debt" is defined as "liability on a claim". 11 U.S.C. § 101(12). "Claim" is defined under the Bankruptcy Code as a --

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

11 U.S.C. § 101(5). In this case, Petitioners have asserted no right to payment. Nor are Petitioners capable of

asserting such right when they have failed to comply with their statutory duty to pay the legal freight charges. Without payment of the legal rate, neither a claim for damages or restoration of amounts paid, as required by the reparations statute, is possible. The Major Shipper Interests confuse a "claim" with a "defense". The latter is what Petitioners really assert.

The Petitioners and supporting *Amici* argue that a bankruptcy or insolvency exception should exist to the filed rate doctrine because their reparations remedy, if any, might be meaningless. A bankruptcy or insolvency exception to the filed rate doctrine, however, creates the very discrimination prohibited by the Interstate Commerce Act. Shippers who owe legal freight bill debts to solvent non-bankrupt carriers will still be required to pay the legal rates. The shippers owing legal debts to bankrupt or insolvent motor carriers will gain an advantage over shippers who must pay the legal rates by their right to defer payment of the legal rates on the bare assertion of unreasonableness. Such preferential treatment provides the non-paying shippers a windfall.

The remedy sought here has no counterbalance under the current Interstate Commerce Act. A shipper that has obtained a legal but unreasonably low rate has taken carrier assets to the extent that charges assessed and collected fall short of the cost of performing the service without any remedy available to the carrier. The only counterbalance would be a rule allowing either the bankrupt carrier or shipper to seek damages based upon a determination of the "reasonable" rate.

Not only is there no bankruptcy or insolvency exception to the filed rate doctrine under the Interstate Commerce Act, not all bankruptcy cases are alike. As an example, the disclosure statement filed and approved in AFS's bankruptcy case estimates a maximum possible dividend estimated to be in excess of $1.00. With the distribution scheduled on or about September 11, 1992, AFS will have paid eighty cents on the dollar to unsecured creditors. If shippers seeking referral to the ICC in AFS's turnover actions had paid the legal rates when billed and filed suits for reparations, assuming arguendo rate reasonableness is a legitimate issue in any of the cases, and prevailed, these shippers would be unsecured creditors capable of realizing a substantial dividend, up to 130% pursuant to the Plan, on their claims.

II. The Petitioners and Supporting Amici Misinterpret this Court's Prior Holdings in Asserting that a Finding by the ICC that the Filed Rate is Reasonable, if disputed, is a Prerequisite to its Enforceability.

The proposition advocated by Petitioners and supporting *Amici* that a finding by the Interstate Commerce Commission that a filed rate is reasonable, if disputed, is a prerequisite to its enforceability is contrary to the filed rate doctrine. In support of this proposition, Petitioner and the Major Shipper Interests continue to rely primarily on an excerpt from this Court's decision in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 110 S.Ct.

2759, 2768 at n.10 (1990) to wit, "the filed rate doctrine, however, contains an important caveat: the filed rate is not enforceable if the ICC finds the rate to be unreasonable," and their interpretation of the Court's decision in *United States v. Western Pacific R. Co.*, 352 U.S. 59 (1956).

A. Maislin

The reliance on the quotation from *Maislin* is misplaced. This Court's warning is plainly substantive and not procedural. If upon a properly brought reparations action a rate is found unreasonable, it is not thereafter enforceable. The statement by this Court does not say that procedurally a rate is not enforceable until, upon a claim of unreasonableness, the ICC determines that the legal rate is reasonable. Had this Court meant as the Petitioners assert the *Maislin* decision would be internally inconsistent. Simply stated, it is impossible to have the legal filed rates subject to mandatory collection as stated by this Court in *Maislin*, citing as here pertinent the statement in *Arizona Grocery v. Atchison, Topeka, & Santa Fe R. Co.*, 204 U.S. 370 (1980); to wit, "under [the Act] the shipper was bound to pay the legal rate; but if he could show that it was unreasonable he might recover reparation, and at the same time hold that the legal rate is not collectable unless and until the ICC upon formal complaint asserting unreasonableness determines it to be reasonable. The net result in the *Maislin* decision would be that the filed rate is not collectable even though this Court has at length advised in the decision that the legally

filed rate is the only rate that may be charged and must be collected. This Court's holding in this regard in *Maislin* at page 2768, *supra*., is as follows:

> We disagree. For a century, this court has held that the Act, as it incorporates the filed rate doctrine, forbids as discriminatory the secret negotiation and collection of rates lower than the filed rate. See *supra*. at _____. By refusing to order collection of the filed rate solely because the parties have agreed to a lower rate, the ICC has permitted the very price discrimination the Act by its terms seeks to prevent. See 49 U.S.C. § 10741. [Also citing *Armour Packing Co. v. United States*, 209 U.S. 56, 81 (1908)].

B. Western Pacific

Reliance on the decision in *United States v. Western Pacific R. Co.*, 352 U.S. 59 (1956), by Petitioners and the supporting *Amici* is also misplaced. In *Western Pacific*, three railroads sought to collect additional freight charges from the United States for the transportation of aerial bomb casings containing napalm gel. The railroads contended that a tariff covering the shipment of incendiary bombs applied. The United States asserted that a tariff covering the transportation of gasoline in steel drums was applicable. The United States further asserted that, if the tariff for incendiary bombs was applicable, the tariff would

be unreasonable as applied to these shipments and, only as to this issue, the United States asserted that the matter should be referred to the ICC. The Court of Claims found for the railroads.

Neither of the parties questioned the lower court's decision construing the tariffs in finding that the tariff covering incendiary bombs applied to these particular shipments. The Court, however, on its own initiative, reviewed the lower court's decision concerning the applicable tariff and found, on the basis of the factual record, that extrinsic evidence and special expertise were required. Accordingly, this Court directed that the issue be submitted to the ICC. The decision is devoted almost entirely to an analysis of the factual record as to proper classification.

With respect to the rate reasonableness issue, the Court found that it was in substance simply a part of the applicability issue. The United States did not assert that the tariff rate on incendiary bombs was unreasonable, only that the rate as applied to these particular shipments was too high because various expenses which were incurred in shipping incendiary devices generally were not incurred in this particular instance. The Court analyzed the reasonableness issue as follows:

> This seems to us to be but another way of saying that the wrong tariff was applied. In both instances the issue is whether the factors which call for a high rate on incendiary bomb shipments are present in a

> shipment of bomb casings full of napalm gel but lacking bursters and fuses... . By no means do we imply that matters of tariff construction are never cognizable in the courts... . We say merely that where, as here, the problem of cost-allocation is relevant, and where therefore the question of construction and reasonableness are so intertwined that the same factors are determinative on both issues, that it is the Commission which must first pass on them.

Id. at 68-69. The Court did not hold that rate reasonableness could be asserted independently as a defense to payment of the filed rate. Nor does *Western Pacific* mandate referral upon the mere assertion that a shipper considers a tariff rate to be unreasonable. On the contrary, the Court in *Western Pacific* stated that:

> And the mere fact that the issue is phrased in on instance as a matter of tariff construction and in the other as a matter of reasonableness should not be determinative on the jurisdictional issue. To hold otherwise would make the doctrine of primary jurisdiction an abstraction to be called into question at the whim of the pleader. *Id.* at 68-69 (footnote omitted).

In this case, and in the cases brought by AFS, a "reasonableness" issue has been asserted at the whim of the shippers, and as a tactic to avoid or delay paying the freight charges legally due. The tactic should be condemned.

CONCLUSION

In view of the above arguments and authorities, *Amicus Curiae* respectfully requests the decision of the Court of Appeals be affirmed.

Respectfully submitted,

By: Norman E. Beal

Norman E. Beal
Kurt Stohlgren
HILLIX, BREWER, HOFFHAUS,
WHITTAKER & WRIGHT
2420 Pershing Road
Two Crown Center
Kansas City, Missouri 64108
(816) 221-0355

ATTORNEYS FOR AMICUS CURIAE

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